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remainderman? If the condition had not happened until after the end of the particular estate, so that the actual seisin, or possession, had become vested in the feoffor, the common law never did allow it to spring from him. Nor did it originally allow even the inheritance to spring, — contingent remainders were not at first valid.[1] This was logical, for contingent remainders are clearly only executory interests,[2] and all other common law estates are vested. "A contingent remainder is no estate: it is merely a chance of having one."[3] But later, the inheritance, though never the actual present seisin, was allowed to spring upon the happening of the condition from the feoffor to the limitee, who thereupon became a vested remainderman. Even when the condition did not occur until the moment of the ending of the particular estate, it is submitted that the contingent remainder took effect, not as such, but on the theory that it became, though but momentarily, a vested remainder by the springing of the inheritance from the feoffor to the contingent remainderman.

These conclusions necessarily result from the view that when a vested estate is given, it cannot be subjected to any conditions limiting the right to possession that it involves, unless the termination of the previous estate be, inaccurately, deemed such a condition. This is incontrovertible, — otherwise there might be an estate vested in a man, and subject to no other estate, which, however, he might not enjoy, and of which he could not take possession. That is inconceivable. There may, however, be a condition subsequent, the effect of which is, not to prevent the taking of possession under the vested int rest, but to divest entirely that interest. Such an estate being possible, it is a question of fact, of construction, whether such an estate be given, or a contingent remainder. If the remainderman is not *in esse*, there is a contingent remainder. If the remainderman is *in esse*, it is convenient to divide, for purposes of construction, all remainders into two classes, — corresponding to classes (*b*) and (*c*) of Professor Kales' classification. In class (*c*), where the condition may not occur till after the end of the particular estate, it is clear that it would generally be contrary to the intent of the testator to allow the estate to be immediately vested, since that might result in giving the remainderman at common law the fee, or at least, under the Statutes of Wills and Uses, possession during a possible interval between the ending of the particular estate and the happening of the condition; whereas it is almost universally the intent of the feoffor to make possession, at any rate, depend upon the prior happening of the condition. Therefore in such cases all conditions are construed as conditions precedent to vesting, and not as divesting clauses, even if subsequent in form. But in cases arising under class (*b*) of Professor Kales' division where the condition must occur if at all before the ending of the particular estate, the above presumption in favor of a contingent estate has no place, and the remainder is construed either as vested and subject to a condition divesting it, or as contingent, according as the condition is in form subsequent or precedent.[4]

It is submitted that the above result, drawing between vested and contingent remainders the same line that exists between vested estates and any other kind of executory estates, — the result attained by Professor Gray's definition[5] which Professor Kales criticises, — is more logical than the suggested classification, and more in accord with authority.[6]

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FEDERAL JURISDICTION IN SUITS BY INDIVIDUALS AGAINST STATES. — Suits by individuals apparently against states, which afford increasingly fre-

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[1] Williams, Real Property, 20 ed., 346.

[2] 2 Washburn, Real Property, 6 ed., 526.

[3] Williams, Real Property, 20 ed., 359. See also *ibid.*, 348, 353, 361, 366; Leake, Land Law, 337.

[4] Gray, Rule Perp., 2 ed., §§ 104, 105, 108.

[5] Gray, Rule Perp., 2 ed., § 101.

[6] *Cf.* Archer's Case, 1 Co. 66 b; Thomas, note to same case, vol. i, p. 165. See Fearne, C. R., *passim*.

quent questions for review by the federal courts, are the occasion for an interesting article in *The Forum*. *Suits against States by Individuals in Federal Courts*, by William Trickett, 11 The Forum 25 (November, 1906). An early decision of the Supreme Court [1] allowed *assumpsit* against a state; but the Eleventh Amendment, which quickly followed, denied jurisdiction to federal courts in suits by citizens of one state against another state, and was judicially extended to prevent suits by a citizen against his own state.[2] Many attempts have been made to avoid the Amendment by suits against state officers, and the principal question now is, — when, though it be not named, is the suit really against the state? To this question the writer has chiefly addressed himself, with the general result of pointing out the more or less serious inconsistencies in the decided cases and the inadequacies of various proposed criteria, rather than of suggesting any sound tests by which the question may be answered.

To coerce an officer may well amount to coercing a state. But it is obvious that the mere plea by an officer when sued in tort for damages, that he acted by order of the state and that it is the real defendant, does not divest the court of jurisdiction, for he is justified only if he had valid legal authority. Moreover, an unconstitutional statute is no authority at all. Consequently, the officer may well be liable in his private capacity and the suit not be one against the state.[3] If the officer is sued for the breach of a contract between the state and the plaintiff, it is clearly a suit within the Eleventh Amendment, since only in his official capacity is he a party to the contract. In a suit against state officers to recover property, either real or personal, which they claim to hold for the state, they must show valid authority if the plaintiff is entitled to possession against them as individuals.[4] A bill against officers to compel specific performance of a contract between the state and the complainant is without the jurisdiction of the court for the same reason that a suit for its breach is bad.[5] The jurisdiction of the court has most often been questioned in replying to petitions for injunctions to forbid unlawful acts, and especially to prevent the enforcement of an unconstitutional statute. Assuming that it is a proper case for interference if the suit were against an individual, it does not seem beyond the court's jurisdiction because it is against an officer, and injunctions have frequently been granted. The state is not the real party defendant, for it cannot have authorized the threatened acts and so cannot be made to shelter the individual who threatens the wrong under color of his office.[6] Similarly equity will enjoin the threatened diversion or waste of a special fund in the treasury, or a trust fund held by the state.[7]

Courts have been slow to compel affirmative performance of a legal duty, though not amounting to specific performance. It seems that a suit or petition for *mandamus* is hardly within the Eleventh Amendment, for an officer cannot at once both represent the state and be liable for not acting for it in the same matter. But no court can assume to control his discretion and will issue its *mandamus* only when he refuses to perform an unequivocal official duty involving no exercise of discretion.[8] But extreme care must be exercised in compelling affirmative action, and one or two decisions seem to have gone rather far toward indirectly compelling the state to perform its obligations.[9] It is believed that affirmative relief has not been granted when it would imply a

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[1] Chisholm *v.* Georgia, 2 Dall. (U. S.) 419. But see the dissenting opinion of Iredell, J., at 429.

[2] Hans *v.* Louisiana, 134 U. S. 1.

[3] Scott *v.* Donald, 165 U. S. 58.

[4] Tindal *v.* Wesley, 167 U. S. 204 (a suit to recover real property); Poindexter *v.* Greenhow, 114 U. S. 270 (detinue).

[5] Hagood *v.* Southern, 117 U. S. 52; Parsons *v.* Slaughter, 63 Fed. Rep. 876.

[6] Pennoyer *v.* McConnaughy, 140 U. S. 1.

[7] Chaffraix *v.* Board, 11 Fed. Rep. 638 (a special fund); Preston *v.* Walsh, 10 Fed. Rep. 315 (a trust fund).

[8] Board *v.* McComb, 92 U. S. 531.

[9] *Cf.* Seibert *v.* Lewis, 122 U. S. 284.

dealing with the property of the state. Because of its proprietary interest, the state may necessarily be involved.[1] Where the state itself is plaintiff, the court may allow a cross-bill or set-off to be maintained against it.[2] This is not a real exception to the rule, for the state has submitted voluntarily to the jurisdiction of the court as an ordinary suitor. But no judgment, even for costs, can be rendered against the state.[3]

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THE LIMITATION OF GROUNDS FOR REVERSAL FOR ERROR. — A serious fault in the administration of American law is the frequency with which our appellate courts order new trials. To the literature on this topic Judge Charles F. Amidon has recently added an admirable essay. *The Quest for Error and the Doing of Justice*, 40 Am. L. Rev. 681 (September–October, 1906). Judge Amidon points out that there has been no improvement since 1887, when new trials were granted in forty-six per cent of the cases appealed in the United States, while in England from 1890 to 1900 the percentage was under four. The defect in administration here, it is said, is that where error is found, prejudice is presumed and the judgment reversed, thus requiring of the trial court infallibility rather than justice. Nothing should be presumed, since the court can see the facts by examining the record; but the temporary greater ease and speed offered by this summary method procured its adoption. The effect on the trial judge has been to divert much of his attention from the question at issue to a multitude of small points, and on the lawyer to put him on a constant hunt for error, equally as important as securing the verdict. The remedy offered by the writer is that no new trial should be granted unless the court, after examining the whole record, finds there has been a miscarriage of justice. This plan has been adopted in England. The verdict, which we have made an end, would be restored to its proper function of being a means of doing justice, without infringing the right of having controverted questions of fact passed upon by a jury. And finally, the writer declares, because of our failure to adopt some such remedy, the machinery of our criminal law is breaking down.

But it is not an accurate statement that on appeal infallibility is required on the part of the trial courts. To be sure, when error exists in the record, one line of cases declares that prejudice is to be presumed unless the contrary is proved, but another maintains that it is not to be presumed unless proved. It would be useless as well as impractical to decide which has the greater support in view of the multitude of cases in point.[4] The doctrine is also well established here that there can be no reversal in favor of a party against whom the court would be justified in directing a verdict.[5] In several states statutes forbid reversal for error not affecting the merits of the action.[6] But Judge Amidon goes further in urging reversal only for prejudice amounting to injustice, and in a few cases our courts have gone thus far.

The old common law principle was not to reverse unless the real truths of the case had not been disclosed.[7] The spirit of the present practice is contentious, offering to the litigants a fair fight with the judge as umpire. But this is really discrimination in favor of the richer litigant. Its result has been to increase our courts' burdens. The common law principle was a trial by the court assisted by the jury, while we have now evolved a trial by the jury with the aid of the

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[1] See Christian *v.* Atlantic, etc., Ry. Co., 133 U. S. 233.
[2] Port Royal Ry. Co. *v.* South Carolina, 60 Fed. Rep. 552.
[3] See Reeside *v.* Walker, 11 How. (U. S.) 272; New York *v.* Dennison, 84 N. Y. 272.
[4] See, *e. g.*, 2 Encyc. of Plead. and Prac. 532; 3 Cyc. 386.
[5] See 3 Cyc. 385.
[6] See Mo. Rev. Stat. 1899, § 865.
[7] See New Trials for Erroneous Rulings, by Professor J. H. Wigmore, 3 Colum. L. Rev. 433.